

EUROPEAN AND AMERICAN IMMIGRATION POLICIES*

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I.

INTRODUCTION

Most of the world's 4,500,000,000 people never leave their country of birth. Those crossing national borders include five major groups: immigrants leaving one country to settle in another, refugees unwillingly fleeing their native land, workers temporarily living and working outside their country of citizenship, and temporary visitors—primarily students, business travelers, and tourists. In addition to these legal migrants, people cross national borders illegally or enter a country legally (e.g., as a tourist) but later violate the terms of their legal admission (usually by working).

The magnitudes of these migrations are not known with certainty. Each year about 1,000,000 people leave one country to begin life as immigrants in another.¹ The world's refugee population fluctuates, but has been in the 11,000,000 to 18,000,000 range during the 1970's.² Another 20,000,000 to 30,000,000 persons live and work outside their country of citizenship, half as legal "guestworkers" and half as "illegal aliens."³ Since many countries do not record the entry and exit of temporary visitors from certain other countries, the number of tourists and other temporary visitors is not known, but probably exceeds several hundred million.⁴

Until the 19th century, "international migration" was of little concern because traditional migration, whether for economic betterment or to flee war or persecution, did not involve the crossing of highly regulated national borders. Between 1840 and 1930, Europe, then the world's most densely populated region, sent more than 50,000,000 migrants to the Americas, South Africa, and Oceania.⁵ Within

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1. This 1,000,000 includes *emigrants* who leave one country to retire in another, e.g., leave the United States to retire in Mexico, Italy, Poland, or elsewhere.

2. UNITED STATES COMMITTEE FOR REFUGEES, 1980 WORLD REFUGEE SURVEY (1980).

3. M. MILLER, FOREIGN WORKERS IN WESTERN EUROPE, AN EMERGING POLITICAL FORCE xv (1981); Martin & Houston, *The Future of International Labor Migration*, J. INT'L AFFAIRS, Fall/Winter 1979, at 311.

4. In fiscal year (FY) 1979, for example, more than 245,000,000 persons crossed the U.S. borders with Canada and Mexico alone. See U.S. DEP'T OF JUSTICE IMMIGRATION AND NATURALIZATION SERVICE, STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1979) [hereinafter cited as 1979 STATISTICAL YEARBOOK].

5. Davis, *The Migrations of Human Populations*, SCIENTIFIC AMERICAN, Sept. 1974, at 58.

Europe, people moved from rural to urban areas, sometimes across amorphous and often changing national borders. However, the lack of well-defined national boundaries, passports, and border guards gave those earlier migrations a more fluid character than contemporary transnational flows, which virtually all countries now seek to regulate.

The United States has been the primary destination for settler immigrants for several centuries. But the history of U.S. immigration policy is also the story of a nation of immigrants progressively restricting access by newcomers—first by refusing to facilitate immigration, then by imposing qualitative restrictions on immigrants, and finally by limiting the number as well as the kind of immigrants accepted each year. Today the United States takes more than half of the 1,000,000 or so settler immigrants accepted by all 164 countries each year, most of the refugees who permanently resettle abroad, many of the tourists and students who cross national borders, and more than 40,000 legal temporary foreign workers.⁶ In addition, an annual net flow of 500,000 undocumented workers are thought to join an illegal resident population of some 3,500,000 to 6,000,000.⁷

When migrant inflows began to surge in the 1960's, few European nations had developed elaborate immigration policies because no one expected Europe to change (still less, to change so rapidly) from an emigration to an immigration region. With the notable exception of France, few European nations have a tradition of accepting immigrants, and most discourage settler immigration. Instead, their immigration policies are explicitly based on the long-accepted maxim of international law that every sovereign nation has the right to "forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."⁸

This paper surveys the postwar migration policies of the United States and Western Europe. After outlining their evolution, this paper explores the fundamental difference between U.S. and European policies: U.S. policies have facilitated the permanent admission of prospective new citizens; Europe has preferred the temporary admission of foreign workers. The paper concludes with an examination of the prospects for policy convergence.

6. See Teitelbaum, *Right Versus Right: Immigration and Refugee Policy in the United States*, 59 FOREIGN AFFAIRS 21-59 (1980). The figure of 40,000 legal temporary foreign workers is a rounded average of the number of H-1 and H-2 workers admitted from FY 1975 to FY 1979, calculated from the Immigration and Naturalization Service (INS) statistics on H-1 and H-2 admissions for those years.

7. STAFF OF SELECT COMMISSION ON IMMIGRATION AND REFUGEE POLICY, COMMITTEES ON THE JUDICIARY, 97TH CONG., 1ST SESS., FINAL REPORT: U.S. IMMIGRATION POLICY AND THE NATIONAL INTEREST, (Comm. Print 1981) [hereinafter cited as SCIRP FINAL REPORT].

8. *Ekiu v. United States*, 142 U.S. 651 (1892). In a time of widespread political instability and increasing nationalism, this principle gives rise to an international dilemma: individuals do not have the right to immigrate, but both emigration and the right to asylum are viewed as fundamental human rights. See Universal Declaration of Human Rights, G.A. Res. 217A, arts. 13, 14, U.N. Doc. A/810, at 71 (1948), reprinted in UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 2 (1978).

II.

BACKGROUND

The migration story begins in Europe. Charles Tilly's survey of migration in European history stresses the circular migration of peasants, landless laborers, and artisans *before* the Industrial Revolution.⁹ This circular migration system moved workers five to ten miles between rural and urban areas as economic opportunities changed. Since the cities were gaining economic advantage, circular migration left "a permanent residue of migrants in the city."¹⁰

The Industrial Revolution changed the character and scale of European migration. Single males and, later, families moved greater distances in a chain-like fashion to the Americas and Oceania. The first settlers sent back information and funds to finance relatives' trips, so that migration begot migration. By the end of the 19th century, however, better economic conditions at home and improved means of transportation permitted increasing numbers of European migrants (especially Italians) to cross the Atlantic in search of a way of supplementing their income rather than in search of a new homeland. A significant minority of the European emigrants thus returned after short stays abroad. If as many as 30% returned,¹¹ then a net European emigration of 50,000,000 between 1800 and World War I implies a gross movement of at least 65,000,000 persons.

For the first 100 years, America welcomed almost everyone who could finance the precarious trip across the Atlantic. Notwithstanding the early arrival of Spanish, Dutch, and German nationals, the British Isles were the source of most of the first American immigrants, making English the dominant language in the United States.

Emigration rose and fell along with Europe's economic development.¹² As the flow of migrants from northern Europe slowed when opportunities at home increased, new waves of migrants poured out of later developing southern and eastern Europe. World War I and its aftermath promoted migration in the form of refugees, but those flows and the economic migrations that began again in the 1920's were halted first by new U.S. limits on immigration and then by the Depression in the 1930's.

World War II generated one of the most massive resettlements in history. During the war, Germany had imported 5,300,000 "foreign workers" and forced an additional 1,500,000 prisoners of war to work, making the German work force 25% "foreign" in 1943.¹³ After the war, millions of ethnic minorities were relocated, e.g., 2,700,000 ethnic Germans from Czechoslovakia to Germany and Austria in 1945-46.¹⁴ The net effect of these postwar refugee movements "was

9. Tilly, *Migration in Modern European History*, in *TIME, SPACE, AND MAN* 175-98 (J. Suindin ed. 1977).

10. *Id.* at 192.

11. S. KUZNETS & E. RUBIN, *IMMIGRATION AND THE FOREIGN BORN* (National Bureau of Economic Research, Occasional Paper No. 46, 1954).

12. B. THOMAS, *MIGRATION AND ECONOMIC GROWTH* (2d ed. 1973).

13. Stirn, *Ausländer Beschäftigung in Deutschland in den letzten 100 Jahren*, in *AUSLÄNDISCH ARBEITER IM BETRIEB* 40 (H. Stirn ed. 1964).

14. Tilly, *supra* note 9, at 187.

therefore to homogenize national states and probably increase their capacity for nationalism."¹⁵ The rise of European nationalism and the postwar concept of the state's responsibility for the welfare of its people help explain Europe's preference for migrant workers over immigrants as well as the concern over territorial border integrity.

III.

EUROPE: FROM GUESTS TO IMMIGRANTS

Continental Europe began postwar reconstruction with massive unemployment, which persisted even after economic reforms and Marshall Plan aid put most countries on the road to sustained economic growth. Unemployment persisted in Germany because of the political need to accept large-scale flows of refugees, while political pressures to accept former colonists kept unemployment high in France and the Netherlands. Isolated labor shortages first appeared in the mid-1950's, when German farmers asked for Italian harvest workers and French farmers requested Spanish and Italian workers.¹⁶ Switzerland, unscathed by war, was already recruiting Italians for manufacturing and construction jobs.¹⁷

Labor-recruiting countries expected their need for additional labor to be short-lived. Labor shortages were thought to be a transitory side effect of the reconstruction boom, and foreigners were recruited to plug putative temporary manpower gaps. When the boom ended and inevitable recessions occurred, the aliens were expected to depart.

The 1957 Treaty of Rome¹⁸ established the European Economic Community (EEC), and article 48 guaranteed citizens of member nations the right to work anywhere in the EEC. The immediate impact of this phased-in guarantee was the increasing use of Italian workers in France and West Germany. However, the continued economic boom encouraged labor-short employers to cast a wider net for additional labor. West Germany concluded labor-recruiting agreements with Greece, Spain, and Turkey in 1960-61;¹⁹ and between 1961 and 1971 France concluded agreements with Spain, Portugal, Algeria, and Morocco.²⁰

The labor-importers were the EEC nine (excluding Ireland and Italy) and non-EEC Sweden and Switzerland.²¹ The labor-sending nations included EEC Ireland and Italy, as well as Portugal and Spain (Iberia), Finland in the north, and Greece, Turkey, and Yugoslavia in the southeast. Algeria has been the most extensive African exporter of labor, but Tunisia and Morocco joined other North African countries as suppliers of labor in the early 1970's. In 1973, when northern Euro-

15. *Id.* at 188.

16. M. MILLER & P. MARTIN, ADMINISTERING FOREIGN-WORKER PROGRAMS: LESSONS FROM EUROPE 8 (1982).

17. *Id.* at 7; M. MILLER, *supra* note 3, at 8.

18. M. MILLER, *supra* note 3, at 9.

19. *Id.*

20. *Id.*

21. For details on labor-importing and supplying countries, see P. MARTIN, GUESTWORKER PROGRAMS: LESSONS FROM EUROPE (U.S. Dep't of Labor, Bureau of Int'l Labor Affairs Monograph No. 5, 1980).

pean labor demands were very strong, a two-stage migration process was observed; as Spanish workers migrated to France, Germany, and Switzerland, they were replaced by North Africans in Spain.

Despite the diversity of sending and receiving nations, some of the labor flows were well established. The Irish, for example, worked almost exclusively in the United Kingdom; the Finns were concentrated in Sweden; France employed most of the Portuguese and Algerians working abroad; Germany employed the Turks and Greeks. The Italians, guaranteed intra-EEC mobility, were diffused across France, Switzerland, and Germany.

The guestworkers moving from south to north were usually unskilled males between twenty and forty years of age. The first migrants were recruited directly by employers or bilateral commissions. However, word-of-mouth news of high wages and the willingness of some countries, such as France, to permit tourists to accept jobs and become migrant workers encouraged both waiting lists of migrants eager to go abroad and "illegal" migration later sanctioned by authorities.

The first labor recruiting agreements were simple—the 1960 German-Spanish agreement, for example, is four pages long.²² After a French or German employer convinced the local labor office that native workers were not available to fill a job vacancy, the employer's request was forwarded to a bilateral recruitment office in Istanbul or Algiers. An individual already screened for health, work skills, and a crime-free background was given an entry visa and a one-year work contract with a specific employer.²³ In Germany, the Federal Labor Office arranged and paid for transportation to the work site, where employers usually provided barracks-style housing. In the late 1960's, some 7,000 to 8,000 migrants were arriving daily in northern Europe.²⁴ One day after arrival, the guestworker was at work on the assembly line or at the construction site.

Temporary labor migration began in an era of international cooperation. When northern European economies blossomed in the 1960's, employers argued that economic growth should not be stifled by labor shortages when massive unemployment existed in southern Europe. If migrants could be recruited for one or two years' work at relatively high wages, they could earn the money needed to accelerate economic growth back home. The returning migrants could put their newly learned industrial skills to work in the factories financed by their remittances, putting poor, labor exporting nations up the road to an economic take-off. As the poverty and unemployment that drove migrants abroad abated, international labor flows would diminish.

22. Agreement on Migrant Workers, May 5, 1960, Germany (Federal Republic)-Spain (International Labor Office, Legislative Series 1960-Int. 3); see also Leben, *Le Droit International et les Migrations des Travailleurs*, in LES TRAVAILLEURS ET LE DROIT INTERNATIONAL 68-102 (Société Française pour le Droit International ed. 1979).

23. For further information on recruitment of these foreign workers, see M. MILLER & P. MARTIN, *supra* note 16, at 53-61.

24. Calculated from the immigration statistics of various European countries.

TABLE 1
GUESTWORKERS IN EUROPE: 1973

Country	Civilian labor force	Foreign workers	Percent	Control measures
Austria	2,950,000	236,000	7.9	March 1975-new controls
Belgium	3,914,000	265,000	6.8	August 1974-recruitment stop*
Denmark	2,406,000	49,000	2.0	November 1973-recruitment stop*
France	21,403,000	1,930,000	9.0	July 1974-recruitment stop*
Germany	26,475,000	2,500,000	9.4	November 1973-recruitment stop*
Great Britain	25,129,000	1,835,000	7.3	January 1973-new controls
Luxembourg	154,000	43,000	27.9	No change
Netherlands	4,681,000	160,000	3.4	December 1974-new controls*
Norway	1,680,000	21,000	1.3	February 1975-recruitment stop
Sweden	3,904,000	222,000	5.7	January 1967-new controls
Switzerland	3,050,000	861,000	28.2	January 1975-new controls
Europe	95,786,000	8,122,000	8.5	

*Applies to migrants from non-EEC countries.

Source: National statistics yearbooks; "Anstieg der Ausländerbeschäftigung gestoppt" (Munich: IFO, April 1975).

The notion that temporary labor migration benefits both sending and receiving countries was so powerful that the number of guestworkers swelled far beyond original expectations. In 1960 only 2,000,000 migrants were employed in northern European nations.²⁵ As seen in Table 1, by 1973 guestworkers comprised almost 9% of Europe's work force. Migrants were more common than native workers in some construction crews and on assembly lines. The dark-skinned foreigners sweeping European streets became a visible reminder of Europe's increasing reliance on foreign workers from the south, as seen in Table 2.

TABLE 2
ORIGIN OF LEGAL MIGRANTS IN EUROPE: 1974

Country	Labor force (000)	Legal migrants (000)	Migrants labor force (percent)
Portugal	3,424	588	17.2
Spain	11,865	574	4.8
Italy	19,763	1,037	5.2
Yugoslavia	8,890	770	8.7
Greece	3,388	249	7.3
Turkey	13,592	698	5.1
Finland	2,129	113	5.3
Morocco	2,910	198	6.8
Algeria	2,879	443	15.4
Tunisia	1,094	82	7.5
Others		2,784	

Source: OECD estimates. The number of legal migrants totals 7,500,000, reflecting the exodus of some 600,000 workers after the oil crisis late in 1973.

The guestworker concept envisioned the rotation of foreign workers in year-round jobs. The self-interest of employers and migrants, however, encouraged a more permanent employment relationship. Migrants were expensive to their employers. Employers had to pay recruitment and housing fees, training and translation costs, and the same wages and fringe benefits available to native workers. Employers did not want to send a trained migrant home just because a one- or two-year work contract expired. The migrants themselves were not anxious to return to the low wages and high unemployment they had left.

The self-interest of employers, migrants, and their labor surplus nations of origin was bolstered by demands from unions (which had migrants as dues-paying members), churches, migrant welfare organizations, and the International Labor Office (ILO) to improve the migrant's status.²⁶ The most important improvement demanded was freedom from forced departure, i.e., the right to continue residence in host nations. Since intra-EEC migrants already had acquired this right by 1968²⁷ and because no interest group explicitly opposed multiple-year work and

25. P. MARTIN, *supra* note 21, at 7.

26. For the texts of the principal ILO instruments concerning migrant worker rights and a discussion of the role of the ILO, see M. MILLER & P. MARTIN, *supra* note 16, at 31-51, 115-65.

27. Treaty of Rome, Article 48, 1957; *see also* M. MILLER & P. MARTIN, *supra* note 16, at 36-39.

residence permit renewals, migrant workers gradually obtained the right to change jobs and to stay in their country of employment.

The unanticipated collapse of the principle of rotation was followed by the equally unanticipated—and antithetical—principle of family reunification. Instead of being forced to return, guestworkers were allowed to have their dependents join them after one or two years of continuous employment and proof of suitable housing. Since migrant dependents were eligible for the whole panoply of host nation benefits, including children's allowances, free education, and national health insurance, the predictable result was the large-scale immigration of wives and children.

In the early 1970's, the migrants and their families became noticeable additions to major European cities. As foreigners moved in, natives moved out, giving European cities American-style concentrations of ethnic minorities. The growing number of foreigners prompted local discontent and the beginnings of antiforeigner campaigns.²⁸

By 1973, the tension between employers clamoring for more migrants and popular fears that Europe's foreign workers were becoming backdoor immigrants forced action. In the spring of 1973, the West German government announced plans to raise recruitment fees in order to discourage "over-reliance" on foreign workers.²⁹ West German employers responded by importing 100,000 migrants monthly.³⁰ The Middle East War in October 1973 and the subsequent oil embargo threatened economic recession and unemployment. As shown in Table 1, the West German government halted migrant worker recruitment³¹ on November 22, 1973, an action duplicated in most of the other labor-recruiting countries.

The 1973-74 recruitment bans were softened by "liberal" measures that expedited family reunification and provided funds to improve migrant housing and social services.³² Few migrants were forced to depart, even if unemployed, but migrants were "encouraged to return." Most host nations spoke of a better integration of the migrants who remained, but few were willing to think of the migrants and their children as future citizens.

The number of migrant workers in western Europe peaked at some 7,000,000 in 1972-73.³³ Since then, the number of foreign workers has dwindled to 5,000,000, but the total legal foreign *population* has almost doubled to 12,000,000.³⁴

28. In France, for example, which had large concentrations of Algerian Arabs, Frenchmen and North Africans were not welcome in each other's cafes in certain neighborhoods. Meanwhile, in Germany, migrants concentrated in ghettos, where they kept largely to themselves and made the natives feel unwelcome. In response, the Germans introduced a rule to prevent new migrants from moving to areas where foreigners made up more than 12% of the population.

29. M. MILLER & P. MARTIN, *supra* note 16, at 58.

30. Martin, *Germany's Guestworkers*, CHALLENGE, July-Aug. 1981, at 38.

31. The recruitment ban applied only to migrants from non-EEC countries. EEC nationals are still free to go to any EEC state in search of work.

32. For a discussion of social policies related to migrant workers, see M. MILLER & P. MARTIN, *supra* note 16, at 73-83.

33. P. MARTIN, *supra* note 21, at 9; Martin & Houstoun, *supra* note 3, at 314.

34. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CONTINUOUS REPORTING SYSTEM ON MIGRATION: SYSTEME D'OBSERVATION PERMANENTE DES MIGRATIONS—SOPEMI ANNUAL REPORTS 1973-81.

Foreigners now constitute 5% to 15% of most host nations' populations.³⁵ During the 1960's, most migrants were working, contributing to expensive social welfare programs but drawing few benefits. Today, nonworking dependents outnumber migrant workers.³⁶ Since most of Europe's social welfare programs redistribute money to poorer and larger families, migrants now drain funds from the programs they once subsidized.

In the 1960's, migrant workers were seen as fuel to sustain noninflationary economic growth. Today, hindsight prompts some observers to conclude that the availability of foreign workers discouraged the search for the labor-saving innovations needed to compete internationally. Japan, for example, accepts no immigrants and has taken the lead in the development of industrial robots. If robots eventually displace workers on the assembly line, then the country that first begins to develop labor-saving technology and production processes is likely to use them most efficiently and profitably.

The most important difference between migrant issues in Europe now and during the 1960's is the wholesale reversal of opinion on the virtue of temporary labor migration. In the 1960's, migrant workers were seen as costfree subsidies to employers. Today, discussion centers on the extra costs of integrating second- and third-generation migrants. In the 1960's, labor exporters optimistically expected remittances and the conversion of unskilled peasants into skilled industrial workers. Today, labor exporters complain that their rich neighbors robbed them of their best and brightest workers and gave them little in return. In short, the optimism that marked guestworker policies in the 1960's has changed to pessimism in both sending and receiving nations.³⁷

Today, some 12,000,000 foreigners live in the northern European countries that recruited migrant workers.³⁸ Despite the fact that many of these "foreigners" were born in France or West Germany (very few European nations grant automatic citizenship to persons born in their territory, as does the United States), and that two-thirds of the rest have been residents for more than six years,³⁹ most countries still talk about the eventual fate of their "temporary alien guests." Even though few remaining foreigners are willing to return to their homeland, better "integration," not absorption into the body politic, dominates discussions.

Instead of undertaking efforts to absorb the remaining foreign population, host nations debate ways to rid themselves of migrants without incurring criticism or destabilizing sending nations. West Germany and the Netherlands have programs that subsidize the building of factories to provide jobs in labor-exporting countries. France is the only country that has offered a departure bonus to migrants surrendering their work and residence permits. Since June 1977, France has offered

35. *Id.* 1981 Report; M. MILLER, *supra* note 3, at 1.

36. There are currently some 5,000,000 working foreigners and some 8,000,000 dependents of foreign workers in Europe. See M. MILLER & P. MARTIN, *supra* note 16, at 11.

37. P. MARTIN, *supra* note 21, at 3.

38. ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, CONTINUOUS REPORTING SYSTEM ON MIGRATION, SYSTEME D'OBSERVATION PERMANENTE DES MIGRATIONS—SOPEMI ANNUAL REPORT 1981 at 33.

39. M. MILLER & P. MARTIN, *supra* note 16, at 88.

10,000 francs (about \$2,000) to all migrants living in France at least five years who would depart permanently. This "*aide au retour*" program has not reduced the number of French migrants substantially. Only 87,500 of France's 1,600,000 migrant workers took advantage of the program in its first three years, and most departing migrants planned to return in any case.⁴⁰ The Mitterand government has indicated that it may let the departure bonus scheme expire.⁴¹

Three issues of current host nation concern are illegal immigration, youth unemployment, and voting rights for noncitizens. Despite tight border controls, mandatory identity cards, separate work permits and residence registration, and stiff fines for employers who hire illegal aliens, many observers believe that the number of illegal aliens is increasing. Observers have long placed the illegal alien work force at 10% to 15% percent of the legal alien work force⁴²—making it at least 200,000 in West Germany and 160,000 in France today. As in the United States, Europeans debate the virtues of new laws and stepped-up enforcement of existing laws to control illegal immigration. Like the explosive increase in the immigration of family members, the rise of illegal immigration highlights one of the central lessons of the European experience with foreign workers—international labor flows are much easier to start than they are to stop.

Youth unemployment is a growing worry because Europe's youth unemployment rate is traditionally *lower* than its average unemployment rate.⁴³ Relatively few alien youth finish middle school. Because they lack a graduation credential, they are denied entrance into the apprenticeship programs that train many European youth to be skilled workers. If the alien youth cannot get into apprenticeship programs, they are confined to the same unskilled jobs their parents were recruited to fill. But migrant youth, reared in the host country, expect native-style job options.⁴⁴ Hence, a dangerous gap is developing between these youths' expectations and the realities of Europe's labor markets, which are now plagued by abnormally high unemployment rates.

Most of the 5% to 15% percent of the population that is foreign are denied the right to vote, thereby reducing the political importance of cities⁴⁵ where they constitute a large percentage of the population, and eroding democratic traditions. Many reformers call for adoption of the Swedish system, which permits non-citizens to vote in local elections.⁴⁶ Most observers, however, argue that the right to vote is not divisible—one has the right to vote in all elections or none. France

40. Several factors contributed to the failure of the French program. The bonus was too small—\$2,000 is less than the annual unemployment benefit most foreigners are entitled to receive. The bonus was paid in local currency *after* the migrant returned. Long delays in making payments and the taxes some countries levied on the bonuses also discouraged participation.

41. Testimony of Dr. Mark Miller before the Senate Subcommittee on Immigration and Refugee Policy, Private Consultation on Foreign Immigration Laws (Dec. 7, 1981).

42. M. MILLER & P. MARTIN, *supra* note 16, at 15-16; Commission of the European Communities, Directorate-General for Information, *The European Community and Migrant Workers*, EUROPEAN FILE, June 1980, at 6.

43. By contrast, youth unemployment in the United States is often three times the average rate.

44. M. PIORE, *BIRDS OF PASSAGE AND PROMISED LANDS, LONG DISTANCE MIGRANTS AND INDUSTRIAL SOCIETIES* 87 (1979).

45. For example, foreigners comprise over 20% of the populations of Brussels and Stuttgart.

46. T. Hammar, *Immigration Research in Sweden*, INT'L MIGRATION REV., Spring 1980, at 98.

and Belgium worry that granting noncitizens voting rights will promote separatist movements or upset delicate linguistic balances.⁴⁷ Even though major political parties of both the left and right have endorsed local voting rights for foreigners, the major European countries are not likely to extend voting rights to noncitizens until the EEC adopts a Europe-wide standard.

IV.

BENEFITS AND COSTS

Evaluating the consequences of the decision to import foreign labor is difficult because migrants affect all facets of sending and receiving nations. Even if all consequences could be identified, the fact that societies are dynamic rather than static makes the isolation of effects traceable solely to migrants almost impossible. Given the multiple factors that affect changing nations, it is hard to predict which economic and social changes would have occurred without migrants. In this analysis, consequences for various groups are evaluated and a qualitative assessment of migrant effects is made.

Benefits and costs attending labor flows can be evaluated at personal or individual levels, where preferences, as revealed by actual choices, are indicative of expected gains and losses; at enterprise levels, where distributional consequences, as between wages and profits, appear; and from the perspectives of both sending and receiving nations. In addition, some benefits may become costs over time or with ever increasing numbers of migrants, forcing a distinction between initial and longer-term effects.

In Table 3, benefits and costs attending temporary labor flows are distinguished by their private or social nature, their impact on individuals and enterprises, and their incidence in sending and receiving nations. Items marked with an asterisk (*) are of a more long-term character.

At the individual level, private benefits are assumed to exceed costs if the individual decides to accept employment abroad. The factors motivating a voluntary decision to migrate are dominated by pecuniary considerations; nonetheless, the individual is assumed to weigh the advantages accruing from opportunities abroad, such as training, against the social pains of adjustment abroad and separation from kin. If expectations of pecuniary gains outweigh the disadvantages attending foreign employment, an individual will seek work abroad. By extension, increases in the earnings differential between sending and receiving areas should augment the supply of potential migrant workers.

Several reservations limit the validity of using observed behavior as an indicator of true personal choice. Lack of information or misinformation may cause the potential migrant to over- or under-estimate the potential gains from work abroad or the adjustment difficulties incurred. Once abroad, a lack of resources may prevent a hasty return. In the sending nation, even discouraging information may be of limited usefulness if employment options at home are nonexistent.

47. Interview with Albert Martens, author of *LES IMMIGRES* (1976), in Brussels (Oct. 1980).

TABLE 3
EVALUATING THE CONSEQUENCES OF LABOR FLOWS

	Benefits		Costs	
	Private	Social	Private	Social
Sending	1. Individual (revealed preferences)	1. *Increased human capital	1. Individual	1. Brain drain effects with nonreturn
	1.1 increased earnings	2. Foreign exchange with worker remittance	1.1 adjustment costs abroad	
	1.2 training (human capital)		1.2 separation from family, etc.	2. Loss of "cream" of domestic labor force
	1.3 *exposure to new culture, etc.	3. Export unemployment and underemployment	2. Enterprise	3. Development dependent on <i>uncertain</i> worker remittances
	2. Enterprise		2.1 upward wage pressures	4. Coping with expectations of returnees
	2.1 *returnees assist trade unions			
	2.2 *trained labor force			
Receiving	1. Individual	1. Permit growth without inflation	1. Individual	1. *Dependence on foreigners in particular occupations
	1.1 *(indirect) benefits of growth without inflation	2. Increase labor force mobility	1.1 labor market competition	
	1.2 underclass to permit upward mobility	3. "Foreign aid" aspects	1.2 adjustment difficulties	2. *Provision of social services
	1.3 downward wage pressures		1.3 competition for housing, etc.	3. *Dulling of efficiency incentives
	2. Enterprise		2. Enterprise	4. *Unrest with concentration of migrants
	2.1 lower overall labor costs		2.1 recruitment and training costs	
	2.2 increase flexibility of labor force		2.2 increased turnover	
	2.3 *increase demand at home and abroad		2.3 may increase labor unrest	
	2.4 may weaken trade unions			

In such situations, any probability of securing employment prompts emigration, and a true personal choice between work abroad and home employment does not exist.

At enterprise levels, benefits to sending areas are dependent in part on the migrants' return. Unless labor is in perfectly elastic supply, the exodus of workers puts upward pressure on wages. Upon their return, migrants trained abroad may be more productive. But expectations from life abroad and trade union experience may also lead to upward pressure on domestic wage levels, making net benefits dependent on whether one adopts a worker or employer perspective. Even if returned migrants do not use the skills acquired abroad, the expenditure of accumulated savings may increase domestic demand, enabling local industry to work closer to capacity and thus augment profits, if returned workers buy domestically produced goods.

With the emigration of males, females in sending nations may enter the labor force to supplement remittances from abroad, thus effecting attitudinal changes which can spur economic development. Females who have worked abroad and returning males socialized to view female labor force participation as legitimate also quicken the pace toward economic freedom for women. The fact that migrants are recruited from urban staging areas and that supplemental work exists in cities means that emigration promotes urbanization, a mixed blessing.

Social benefits and costs are most important for policy prescription, yet even qualitative assessments are not unambiguous. The export of labor generates an inflow of remittances to dependents at home.⁴⁸ But this foreign exchange source is dependent on employment of nationals abroad and the continued presence of kin at home, making this exchange source too unstable for incorporation in any development plans. Unemployment may be exported abroad, but it may be "imported" again when recruiting nations experience a recession. The sending nation may gain net additions to its stock of human capital, but the value of this gain depends on the migrants obtaining training that is germane to the sending society's technology *and* returning home. Foreign employers prefer to select the best workers. Because skilled workers selected by foreign employers tend to stay abroad, human capital gains to sending nations may be illusory. In short, benefits to sending nations must be heavily discounted because of the instability of remittances, because workers trained abroad do not always return, and because their training is not necessarily pertinent to employment opportunities at home.

Even if sending nations receive unequivocal benefits from promoting labor exports, they have little power to affect the timing, extent, or duration of migration—a fact of life that does little to soothe North/ South relations. The demand for migrants is created in recruiting nations: they determine who is hired, how much ancillary training is provided, and the duration of employment abroad. Sending nations can try to regulate the exodus of workers by restricting it to single males or by requiring return within five years to maintain citizenship, but decisions made in recruiting nations determine the magnitude, type, and timing of

48. P. MARTIN, *supra* note 21, at 26.

international labor flows. Since no single emigration country has a monopoly on supplying temporary labor—the number of developing nations with a surplus of labor is very large—sending nations are in a weak position to bargain over the terms of employment abroad.

Individuals in receiving nations are hurt by migration if they must compete with migrant workers for jobs; of course they may otherwise be helped, hurt, or unaffected, depending on whether migration provides net economic and social benefits, imposes net costs, or has no net effects at all. Most of the migration-generated *benefits* to individuals in receiving nations are nonpecuniary, e.g., the availability of an underclass, which increases the status of natives and may promote upward mobility. Some benefits are more indirect, such as the benefits of continued economic growth. If unskilled migrants complement the more skilled domestic labor force, the presence of migratory labor may increase the wages and the bargaining power of that part of the domestic labor force.

Employers in receiving nations are the prime beneficiaries of migrant labor. By importing foreigners, wage scales do not have to be readjusted, workers can be shifted with dispatch from one area to another, and upward pressures on wage rates are curtailed.⁴⁹ The employment of foreign workers does entail recruitment and training costs, does result in increased worker turnover since many foreigners return to their countries of origin, and can provoke labor unrest. The magnitude of these negative factors for employers is usually more than offset by wage cost advantages, however, since employers continue to press for migrants. The precise measurement of net advantages to employers arising from the employment of migrants appears impossible; attempts to compare the rate of increase in wages between industries with different degrees of reliance on foreigners suffer from comparability problems and an inability to isolate the impact of migrants on wages.

Net social benefits to receiving nations are most vital for predicting future immigration policies in northern Europe. The labor importation countries adopted implicit laissez-faire policies; employers were permitted to recruit where and as they wished. Some countries assisted employers by establishing recruitment and screening centers in sending nations. The prime social benefit of the resulting labor influx was to be economic growth without inflation. Although it was acknowledged that externalities existed, it was assumed that their macroeconomic effects were favorable—access to a reserve labor supply increased a receiving nation's short-run labor supply elasticity, tending to limit wage gains while augmenting profits. Since investment is assumed to result from profits, and investment produces economic growth, factors that increase profits also increase growth rates. Under the dominant economic assumptions, international labor flows, controlled by labor recruiting nations, were to provide benefits at both micro- and macroeconomic levels.⁵⁰

49. See C. KINDLEBERGER, *MIGRATION, GROWTH AND DEVELOPMENT* 7 (1979); P. MARTIN, *supra* note 21, at 27.

50. See J. POWER, *MIGRANT WORKERS IN WESTERN EUROPE AND THE UNITED STATES* 26-43 (1979); J. POWER & A. HARDMAN, *WESTERN EUROPE'S MIGRANT WORKERS* 12-16 (Minority Rights Group Report No. 28, May 1976); *Illegale Arbeitnehmer: Boom in der Flaute*, *DIE ZEIT*, Feb. 19, 1982.

The economic benefits derived from increased labor market flexibility and adaptability were immediate; the social costs in receiving nations appeared much later. Although the age structure and the predominance of single men initially resulted in migrants' subsidizing domestic recipients of social welfare programs, family reunification diminished and sometimes reversed this subsidy. Foreign workers in Europe tended to concentrate in particular industries and occupations. A highly visible example was the increased dependence on foreign workers to provide essential public services, a dependence uncomfortably highlighted by wildcat strikes and outbreaks of racial violence in a number of nations in the early 1970's.⁵¹ The presence and availability of low-wage migrant labor also prompted fears that firms employing large numbers of migrants could get "flabby" as employers became less willing to substitute capital for labor.

In addition to the question of net host-nation benefits and costs, the distribution of benefits and costs is important for evaluating migration policies. In receiving nations, employers and skilled workers generally benefit and unskilled workers or "disadvantaged" groups who compete with migrants generally lose. Finally, general costs may be imposed if the tax paying population is forced to build a public infrastructure—e.g., low-cost housing and schools for migrant workers and their families.

Some problems attributed to migrants in Europe were not caused by imported labor. In particular, since the migrants were at least initially imported to fill existing job vacancies at prevailing wage rates during a time when unemployment hovered around 1%, they could not have *caused* unemployment. Over time, however, the effects become more complex and less benign; for example, the continued presence of low-skilled aliens can slow the rate at which wages rise and unskilled jobs disappear. The impact of migrants on the host-nation's consumption and inflation prospects is more complex. As migrants stay longer, they tend to spend more of their earnings abroad.⁵² If migrant preference patterns differ from domestic preferences, shortages in particular sectors may result. If prices are rigid, demand-pull inflation in some sectors may increase overall inflationary pressures.

While European nations have been discouraging new flows of foreign workers and struggling with integration of the old, the United States has been debating the merits of initiating a large-scale Mexican worker program. Unlike western Europe, whose interest in foreign workers was evoked by pronounced labor shortages in a boom economy, the United States consideration of such a program, in a quite different economic period, stems almost entirely from its preoccupation with controlling illegal immigration—in this case, by replacing its flow of illegal immigrants with a regulated flow of legal temporary workers. Notwithstanding this key difference, the economic rationale for foreign workers in the United States today is fundamentally like that of Europe's in the 1960's. U.S. proponents hope, however, to design a system of supplemental low-skill, low-wage labor that really does

51. In France, for example, the Algerian consulate in Marseille was bombed in December 1973.

52. For further development of this subject, see Statistisches Bundesamt, *Statische Umschau: Bevölkerung, WIRTSCHAFT UND STATISTIK* (1981).

shuttle foreign workers in and out of U.S. jobs, principally in agriculture, on an as-needed basis.

Illegal immigration has been a subject of continuing, albeit inconclusive, national attention in the United States since 1970. Since that time, however, the impasse between those who profit and those who lose by new enforcement measures, or by a legal substitute for that movement of undocumented workers, has become encrusted by new immigration control issues. In particular, as illegal immigration continued unabated during the 1970's and estimates of the illegal resident population rose, questions about the fate of that population became more and more pressing. As with Europe's legal guestworkers, the very size of this alien population magnifies the economic and political repercussions of any policy of return, integration, or neglect.

Further, the unanticipated pushout of some 125,000 Cubans⁵³ in April 1980 and the arrival of undocumented Haitian boat people in Florida during that same period brought the problem of mass asylum to U.S. shores for the first time. Extraordinarily high levels of refugee admissions (232,000 in 1980,⁵⁴ as contrasted with the 50,000 normal flow anticipated by the 1980 Refugee Act) and a strong upward trend in the numerically unrestricted flow of immediate relatives of U.S. citizens (151,000 in 1980;⁵⁵ 86,000 in 1970)⁵⁶ led to questions about the need to exert new limits to legal, as well as illegal, immigration. The recommendations of the Select Commission on Immigration and Refugee Policy (SCIRP), President Reagan's proposals, and the Simpson/Mazzoli bill are all responses to this kaleidoscope of immigration events, and all are meant to assert control, variously defined, over immigration.

V.

U.S. IMMIGRATION POLICY AT A CROSSROADS

Despite our immigrant heritage, Americans are opposed to more immigration. The Roper Poll of June 1980 found that 91% of all Americans support an "all-out effort" to stop illegal immigration, and 80% percent want to reduce the number of legal immigrants and refugees accepted each year. First SCIRP, and now President Reagan and the chairmen of the immigration subcommittees in both houses of Congress want to stop illegal immigration and push immigrants into legal entry channels. Indeed, SCIRP's major recommendation was that the United States "[close] the back door to undocumented/illegal migration [and open] the front door a little more to accommodate legal migration."⁵⁷

Reforming U.S. immigration policy has never been easy, however. Despite a

53. *United States As A Country Of Mass First Asylum: Hearing on Oversight on the Legal Status of the Cubans and Haitians Who Have Entered the United States and the Policies and Procedures Which Should Be Adopted in Order to Handle Future Mass Asylum Cases and Crises, Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. (1981)(testimony of Thomas O. Enders, Assistant Secretary of State for Inter-American Affairs).

54. SCIRP FINAL REPORT, *supra* note 7, at 93.

55. *Id.*

56. 1979 STATISTICAL YEARBOOK, *supra* note 4, at 3.

57. SCIRP FINAL REPORT, *supra* note 7, at 3.

tendency to identify an open society as one with open borders and a mythic belief that the United States has always welcomed the world's tired and poor, U.S. immigration policymaking has often been propelled not only by self-interest, but by the antithesis of the democratic ideals immigration is supposed to express—racism and xenophobia. Immigration law grew out of an ever-lengthening list of excluded “undesirables” in the 1880’s—first prostitutes and convicts, then Chinese, lunatics, idiots, and contract laborers, i.e., foreign workers, who were excluded because they were viewed as unfair labor competition and because the United States only wanted workers who wanted to become Americans.⁵⁸ Current immigration law excludes more than thirty classes of undesirable aliens, including homosexuals and security risks.⁵⁹ The 1907 Immigration Commission, headed by Senator William Dillingham, demanded the first *quantitative* restrictions to keep increasingly large—and ethnically different—numbers of immigrants out of the United States.⁶⁰ The temporary Quota Law of 1921 limited immigration from any Eastern Hemisphere country to 3% of the foreign-born persons from that country living in the United States in 1910.⁶¹ In 1924, the Immigration Act Origins Law set an annual quota for each country of 2% of a nationality’s U.S. residents in 1920 and restricted such immigration to 150,000 annually.⁶² Western hemisphere nations, including Mexico, were exempt from numerical restrictions, as were certain classes of immediate relatives of American citizens.

In 1952, the current Immigration and Nationality Act (INA) was enacted over President Truman’s veto.⁶³ In essence a recodification of then-existing immigration and nationality law, the explicitly ethnocentric INA reaffirmed national origins quotas. As a part of the civil rights movement of the time, however, the bitterly contested 1965 amendments⁶⁴ eliminated those quotas and established a seven-tier system of family, skill, and refugee preferences to rank numerically restricted would-be immigrants. These amendments also strengthened provisions that protect American workers from immigrant competition. Immigrants seeking entry as workers today must have a U.S. job offer, and their prospective employer must show that American workers are not available to fill the job and that the wages and working conditions attached to the alien’s job offer will not adversely affect similarly employed workers in the United States.⁶⁵ In addition, the exemp-

58. See U.S. IMMIGRATION COMMISSION, 1 ABSTRACTS OF REPORTS OF THE IMMIGRATION COMMISSION, S. DOC. NO. 747, 61st Cong., 3d Sess. 46-47 (1911).

59. Immigration and Nationality Act, 8 U.S.C. §§ 1101-1503, 1182 (Supp. IV 1980).

60. Nevertheless, some elements of immigration law facilitated entry—at least of relatives and refugees—after quantitative restrictions took effect. Congress exempted political offenders from the 1875 exclusion of criminals and agreed that refugees from religious persecution did not have to pass the 1917 literacy test.

61. C. GORDON & H. ROSENFELD, IMMIGRATION LAW AND PROCEDURE 1-12 (rev. ed. 1982).

62. For a detailed history of U.S. immigration law, see C. GORDON & H. ROSENFELD, *supra* note 61; see also CONGRESSIONAL RESEARCH SERVICE, LIBRARY OF CONGRESS, U.S. IMMIGRATION LAW AND POLICY: 1952-1979 (1979).

63. C. GORDON & H. ROSENFELD, *supra* note 61, at 1-14.

64. For a detailed discussion of the provisions, and the circumstances surrounding the passage of the 1965 amendments, see CONGRESSIONAL RESEARCH SERVICE, U.S. IMMIGRATION LAW AND POLICY: 1952-79, *supra* note 62, at 51-88; see also A. SCHWARTZ, THE OPEN SOCIETY 99-137 (1968).

65. The Immigration and Nationality Act, 8 U.S.C. § 1182(a)(14) (1980); Dep’t of Labor Reg., Labor Certification for Permanent Employment of Aliens in the United States, 20 C.F.R. § 656.1 (1982).

tion of immediate relatives from numerical restrictions was extended to include the spouse and parents, as well as the minor children, of U.S. citizens.

The 1965 amendments replaced the national origin quotas with a 20,000 per country limit on numerically restricted immigrants from Eastern Hemisphere nations. Eastern Hemisphere nations could send a total of 170,000 immigrants to the United States annually; Western Hemisphere nations were given 120,000 immigrant slots, but no country limits or preference system. In 1976, the INA was amended⁶⁶ to extend the preference system and the 20,000 per country limit to the Western Hemisphere. In 1978, the two hemisphere ceilings were replaced by a single worldwide ceiling of 290,000.⁶⁷ The 1980 Refugee Act eliminated the preference⁶⁸ for refugees fleeing Communist countries or the Middle East, leaving 270,000 immigrant slots for four classes of relatives and two classes of workers. The Refugee Act also broadened the INA definition of refugee so that it is now equivalent to the UN definition,⁶⁹ and provided for annual Presidential determination of refugee admissions after consultation with the Congress.⁷⁰

A. SCIRP

U.S. immigration policy today is explicitly humanitarian in principle, strongly favoring family reunification and refugee admissions. In practice, however, it is also highly utilitarian, since illegal immigration has been delivering very large numbers of undocumented foreign workers to U.S. employers for more than a decade. This international labor flow is not, however, a new phenomenon. Mexican illegals are part of the very folklore of the Southwest. Indeed, large-scale flows of undocumented Mexican workers occurred in the early 1950's, during the midst of the World War II-generated U.S.-Mexico farmworker program, which admitted some 4,000,000 Mexican workers over its twenty-two-year lifespan.⁷¹ After INS mounted "Operation Wetback" and apprehended nearly 2,000,000 illegals in 1953-54, however, the flow diminished until the late 1960's.⁷² Since then it has become a national, rather than a regional, fact of life as illegal immigration snowballed to include Third World nationals from many other countries, particularly nearby labor-surplus Caribbean nations. Despite a series of attempts to stop illegal flows by enacting a law making it illegal to hire an undocumented alien—proddings that date back to the 1951 Truman Commission on Migratory Labor⁷³

66. C. GORDON & H. ROSENFELD, *supra* note 61, at 1-30 to 1-32.

67. *Id.* at 1-32.1.

68. *Id.* at 1-32.2.

69. *Id.* at 1-32.3; *see also* Immigration and Nationality Act, 8 U.S.C. §§ 1101(c)(42) (Supp. IV 1980), as amended by Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (1980); U.N. Convention on the Status of Refugees, G.A. Res. 429(v), 8 U.N. GAOR Supp. (No. 20) at 48, U.N. Doc. A/1775 (1950-51) and 1 U.N. ESCOR Supp. (No. 1) at 58, U.N. Doc. E/1849 (1950), *complete convention also listed as* U.N. Doc. A/CONF.2/108(1951) (convention) and 11 U.N. GAOR Supp. (No. 11A), U.N. Doc. A/6311/Rev. 1/Add. 1 (1966-67) (protocol).

70. Refugee Act of 1980, 8 U.S.C. § 1525 (1980).

71. P. MARTIN, *supra* note 21, at 1.

72. 1979 STATISTICAL YEARBOOK, *supra* note 4, at 66.

73. *See* PRESIDENT'S COMMISSION ON MIGRATORY LABOR, MIGRATORY LABOR IN AMERICAN AGRICULTURE, REPORT OF THE PRESIDENT'S COMMISSION ON MIGRATORY LABOR 180 (1951).

and include two bills that passed the House in the early 1970's⁷⁴—the Congress has been unable to enact laws to discourage illegal immigration. A series of executive studies of the problem during the 1970's, culminating in the March 1979 Inter-agency Task Force on Immigration Policy staff report (the only visible result of the August 1977 Carter Administration illegal immigration bill) finally led to the 1978 establishment by the Congress of the Select Commission on Immigration and Refugee Policy (SCIRP).⁷⁵ With half of the sixteen Commissioner slots slated for members of the House or Senate immigration subcommittees, the creation of SCIRP signalled the possibility of Congressional action.

Although SCIRP's mandate included a comprehensive review of U.S. immigration and refugee policies and practices, illegal immigration was SCIRP's *raison d'être*. SCIRP's sounding of public opinion found that "the message is clear—most U.S. citizens believe that the half-open door of undocumented/illegal migration should be closed."⁷⁶

Not surprisingly, the number of illegal aliens entering or in the United States is unknown. Partial evidence for the belief that there is a large underground population in the United States comes from apprehension statistics. Since 1970, the Immigration and Naturalization Service (INS) has apprehended more than 8,000,000 persons residing illegally in the United States.⁷⁷ Most were Mexican nationals caught near the border, where the INS concentrates its enforcement efforts.⁷⁸

The SCIRP staff approach to the technically difficult and politically treacherous question of research on illegal immigration was so cautious that its results are notoriously cursory. With respect to the less contentious questions of the numbers and characteristics of illegal aliens, it discovered five "common findings":

—A review of "other studies" led Census Bureau demographers to estimate that in 1978 about 3,500,000 to 6,000,000 aliens may have been present illegally. Less than half were Mexican.

—Young single males are most likely to attempt surreptitious entry (entry without inspection) across U.S. borders. Aliens using false documents or violating terms of their legal entry are more diverse in terms of age, sex, and marital status.

—Almost all illegal immigrants are attracted by U.S. jobs that pay relatively high wages, often five to ten times the earnings the alien can expect at home.

—Most illegal aliens in the United States earn at least the minimum wage. Agricultural and domestic workers and those working near the U.S.-Mexican border tend to earn lower wages than workers in other occupations or in other parts of the country.

—There is no meaningful "average length of stay" in the United States. Studies reveal a wide range of stay, from several months to many years, depending on the location of the study and the characteristics of the samples.⁷⁹

SCIRP also reviewed the *impact* of illegal aliens on wages and unemployment, social service costs, and their "overall effect on U.S. society," but found almost "no

74. CONGRESSIONAL RESEARCH SERVICE, *supra* note 64, at 73-74.

75. C. GORDON & H. ROSENFELD, *supra* note 61, at 1-32.4.

76. SCIRP FINAL REPORT, *supra* note 7, at 35.

77. See U.S. DEPT. OF JUSTICE, IMMIGRATION AND NATURALIZATION SERVICE ANNUAL REPORTS, 1970-79.

78. 1979 STATISTICAL YEARBOOK, *supra* note 72; U.S. Dep't of Justice Immigration and Naturalization Service unpublished statistics for FY 1980 and FY 1981.

79. See SCIRP FINAL REPORT, *supra* note 7, at 37.

consensus."⁸⁰ The Commission noted that opinions on job displacement range from zero (no displacement) to one (every illegal alien displaces one American).⁸¹ Similarly, SCIRP reported that some economists believe the presence of unskilled illegals increases the wages of skilled workers but depresses the wages offered to youth and unskilled Americans.⁸² SCIRP adopted a middle position on both issues, concluding: "[A]lthough the effect of undocumented/illegal immigration in the U.S. labor force is not quantifiable, it is apparent that the continuing flow of undocumented workers across U.S. borders has certainly contributed to the displacement of some U.S. workers and the depression of some U.S. wages."⁸³

SCIRP sided with those who argue that illegals typically have payroll taxes deducted from their paychecks but avoid the work and social service agencies that provide benefits for fear of being apprehended. David North's tabulation of taxes-paid/benefits-received data from ten studies supports the SCIRP position, although his own 1981 study of 580 aliens apprehended in 1975 found that about half of the 147 illegal aliens who had worked in California after their apprehension filed for unemployment insurance, and 35% percent collected!⁸⁴

Aliens illegally present are returned to their homeland if apprehended. However, the INA explicitly exempts U.S. employers from penalties attached to smuggling or harboring illegal aliens.⁸⁵ Illegal aliens, like all workers in the United States, are protected by labor standards laws.⁸⁶ But few illegals, whether they are aware of their rights or are victims of systems they do not understand, complain when their employers break wage and working condition laws.

Informed aliens may be just as docile as their less knowledgeable brethren because many fear that a complaint will encourage their employers to turn them in to the INS.⁸⁷ The informed alien who knows that he should be paid \$3.35 hourly instead of \$3.00 also knows that the extra \$0.35 over 1,000 more hours is worth \$350. However, if the complaint leads to apprehension, the alien worker loses wages, will probably have to pay another \$300 to \$400 smuggling fee to get back into the United States, and may have to find another U.S. job. Partial enforcement by the INS of immigration laws therefore encourages the smuggling business. This, together with the lack of penalties against employers who *knowingly* hire illegal aliens, sustains a system that delivers docile Third World workers to U.S. employers.⁸⁸

80. *See id.*

81. *Id.*

82. *Id.* at 40-41.

83. *Id.* at 41.

84. D. NORTH, GOVERNMENT RECORDS: WHAT THEY TELL US ABOUT ILLEGAL IMMIGRANTS vii (New Transcendy Foundation 1981).

85. 8 U.S.C. §§ 1101, 1324(a)(4) (Supp. V 1981).

86. The National Labor Relations Act (NLRA) and the Fair Labor Standards Act (FLSA) apply to all workers in the United States, regardless of their legal or illegal status.

87. R. Thomas, Citizenship, Work Organization and Earnings: Undocumented Workers in Southwestern Agriculture, (Aug. 1981) (paper presented at the 76th Annual Meeting of the American Sociological Association).

88. For a development of this thesis, see E. Stoddard, *Illegal Immigration in the Borderlands: Institutionalized Supports of an Unlawful Practice*, (Aug. 1975) (paper presented at the 70th Annual Meeting of the American Sociological Association).

Would a "guestworker program" curb pressures to enter the United States illegally by providing the United States with a legal substitute for the current illegal flow of workers? SCIRP "carefully weighed" the arguments for and against guestworker programs. The report stated: "Most Commissioners have concluded (14-1) that the Commission should not recommend the introduction of a large-scale temporary worker program."⁸⁹ Instead, SCIRP voted (14-2) to modify the current H-2 program that admits "nonimmigrant" temporary workers for temporary U.S. jobs.⁹⁰ SCIRP recommended that the Department of Labor "streamline" the certification process, which screens U.S. worker availability and adverse effect, and that employers of H-2's be required to forward to the Treasury the social security and unemployment taxes they now save by hiring illegal workers.⁹¹ Lastly, in an attempt to embrace the interests of both employers and workers, SCIRP recommended that while government, employers, and unions should cooperate to end the dependence of any industry on a constant supply of H-2 workers, its recommendation did not exclude a slight expansion of the program."⁹²

Rather than recommend a legal substitute for large-scale illegal immigration, SCIRP recommended (1) enforcement to keep out new illegal entrants and (2) a legalization process for persons illegally present in the United States before January 1, 1980.⁹³ SCIRP's enforcement package included "better border and interior controls" and "economic deterrents in the workplace," i.e., more and better trained border patrol officers and equipment, crackdowns on alien smugglers and visa abusers, civil and possibly criminal penalties for employers who knowingly hire illegal aliens, the development of a "more reliable" mechanism to enable employers to distinguish legal from illegal workers, and increased enforcement of labor standards laws.⁹⁴ SCIRP recommended a one-time amnesty program for aliens illegally in the United States before January 1, 1980. This legalization program would be implemented after new enforcement measures are put in place, and would permit illegal aliens to obtain immigrant status.⁹⁵ The details of the amnesty program were left to Congress, but SCIRP estimated that if the residency requirement were set at two years, approximately 60% of the undocumented aliens then in the United States would qualify.⁹⁶

Will increased border enforcement, employer sanctions, and an identification system for all workers seeking jobs stop illegal immigration? No one can give an unequivocal answer. Most immigration specialists believe that this three-pronged enforcement strategy will sharply reduce illegal immigration. Only 350 officers⁹⁷

89. SCIRP FINAL REPORT, *supra* note 7, at 45.

90. The 1952 Immigration and Nationality Act provision for nonimmigrant ("H-2") workers for temporary jobs if U.S. workers are in short supply ended the 70-year U.S. prohibition regarding the admission of foreign workers. See 8 U.S.C. § 1101(a)(15)(H) (Supp. V 1981).

91. SCIRP FINAL REPORT, *supra* note 7, at 229.

92. *Id.* at 226.

93. *Id.* at 76.

94. For a detailed discussion of SCIRP debate and recommendations in this area, see SCIRP FINAL REPORT, *supra* note 7, at 45-71.

95. *Id.* at 73.

96. *Id.* at 77-78.

97. Teitelbaum, *supra* note 6, at 29.

patrol the 1,900-mile Mexican border, one for every six miles. But most of the Mexican border is "self-policing" desert—60% of all illegal aliens who are apprehended are found along sixty miles of border in the lower Rio Grande Valley and around El Paso, Texas, and Chula Vista, California. Similarly, while fines and identification may not prevent the hiring of illegal aliens, penalties of \$500 to \$1,000 per illegal hire would help reduce the economic incentives that now make some employers prefer aliens. Immigration enforcement will never be completely successful; the policy question is, what level of failure is the United States willing to tolerate?

B. The Reagan Proposals

On July 30, 1981, four years after President Carter announced his immigration reform proposals, President Reagan released a reform package designed to reassert control over immigration. The Reagan package offered "a policy that will be fair to our own citizens while it opens the door of opportunity for those who seek a new life in America."⁹⁸

Just as SCIRP's recommendations built on those of its predecessors, so too, many of the Reagan proposals drew upon SCIRP's recommendations. In particular, the new administration's reform package recommended that employers of four or more workers face civil fines of \$500 to \$1,000 if they knowingly hire illegal aliens.⁹⁹ Opposition to a national identification card prompted the Reagan Administration to propose that American employers ask all job applicants for either an INS document establishing an alien's right to work in the United States *or* any two pieces of official identification of U.S. citizenship, e.g., a birth certificate, driver's license, Social Security card, or Selective Service registration card.¹⁰⁰ In addition, when job applicants seek a job, employers would have to sign a government form stating that the applicant's identification documents have been examined. Applicants would have to similarly certify that they are U.S. citizens or aliens entitled to work in the United States.¹⁰¹

Under the Reagan proposals, aliens illegally present in the United States before January 1, 1980, would be eligible to apply for a new status: temporary resident alien.¹⁰² A temporary resident would be allowed to work in the United States but could not sponsor the admission of family members or relatives. Temporary residents would pay income and payroll taxes but would be barred from Medicaid, welfare, and other social services programs. Every three years, an alien could have this temporary residence status renewed. Ten years after their date of illegal entry (e.g., 1986 for aliens who were illegal residents in 1976) and after a demonstration of minimal proficiency in English, temporary residents could apply

98. 17 WEEKLY COMP. OF PRES. DOC. 830 (Aug. 3, 1981).

99. *Administration's Proposals on Immigration and Refugee Policy: Joint Hearings Before the Subcomm. of the House Comm. on the Judiciary and Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess. 73 (1981) (testimony of Attorney General William French Smith) [hereinafter *Smith Testimony*].

100. *Id.*

101. *Id.*

102. *Id.*

for permanent resident alien (immigrant) status. The acquisition of immigrant status would automatically entitle them to apply for the admission of the spouses and unmarried children as numerically limited second preference immigrants. After five years, immigrant status would likewise give them access to U.S. citizenship.

Employer sanctions would deter illegal entrants by closing the labor market door now opened by U.S. employers. President Reagan also proposed more border and interior enforcement, a doubling of annual immigration ceilings for Canada and Mexico (now 20,000 each),¹⁰³ and diplomatic efforts to encourage Mexico and other U.S. neighbors to help curb illegal immigration. SCIRP also endorsed the need for more enforcement and international cooperation but recommended that the *worldwide* immigration ceiling be raised.¹⁰⁴

Instead of expanding the current H-2 program, President Reagan proposed a two-year experimental guestworker program that would allow 50,000 Mexicans to work in the United States for up to one year.¹⁰⁵ Each state that wanted to participate in the program would determine which occupations needed foreign workers and how many foreign workers it needed. The Department of Labor would annually sum up the governors' requests for foreign workers and give each state its pro rata share of the 50,000. The Mexican guestworkers would be covered by U.S. labor laws, but they would not be eligible for food stamps, Medicaid, Social Security payments, or other federal benefits. Unlike H-2 workers in the United States or European migrant workers in the early years of the guestworker programs, Mexican workers admitted in this experimental two-year program would not be restricted to employment in jobs for which they were admitted. Instead, they would be free to move at will in the U.S. labor force, albeit within the confines of the occupations and states from which they were not excluded.

C. The Simpson/Mazzoli Bill

On March 17, 1982, the Republican chairman of the immigration subcommittee of the Senate Judiciary Committee, Alan Simpson of Wyoming, and his Democratic counterpart in the House, Romano Mazzoli of Kentucky, introduced a bipartisan response¹⁰⁶ to the administration's proposals, which had been introduced in Congress on October 20 as the Omnibus Immigration Control Act of 1981.¹⁰⁷

Again, the purpose of this compromise bill is to gain control over immigration to the United States—principally through proposed measures to curb the flows of undocumented workers, but also (as in the administration's bill) through measures to deal with the recent problem of mass asylum, which emerged in May 1980 when

103. This presumably raises the world wide quota from 270,000 to 310,000 per year.

104. SCIRP recommended that the annual worldwide ceiling be raised to 350,000 from the current 270,000. The Commission also recommended that an additional 100,000 visas be made available each year for the first five years in order to allow the current backlog to be cleared.

105. *Smith Testimony*, *supra* note 99.

106. S. 2222, 97th Cong., 2d Sess., 128 CONG. REC. S2218-19, H941-43 (daily ed. March 17, 1982)(summary of bill).

107. H.R. 4795, 97th Cong., 1st Sess., 127 CONG. REC. H7504 (daily ed. Oct. 20, 1981).

an unanticipated 125,000 Cuban and 10,000 Haitian arrivals claimed asylum in south Florida. In addition, unlike SCIRP, which sought to increase legal immigration,¹⁰⁸ or the administration's bill which concentrated on the pressing immigration problems and proposed no major changes in immigration policy, the Simpson/Mazzoli bill seeks additional control over legal immigration (by capping all immigrants at 425,000 annually, including numerically unrestricted immediate relatives, whose numbers have been steadily increasing).¹⁰⁹

The centerpiece of the Simpson/Mazzoli bill is the same as that of the administration's bill: employer sanctions. The former is, however, significantly stronger than the latter: it covers all employers, not just those with more than four employees, and it includes criminal sanctions as well as stiffer civil penalties.¹¹⁰ Further, while the Simpson/Mazzoli bill essentially accepts the administration's proposals regarding an identification system to protect employer liability and prevent employer discrimination, it accepts them only as an interim measure. The bill also directs the President to "develop and implement a new, secure system to verify work eligibility within three years. Such [a] system would not be available for any other law enforcement purpose and, if it were to involve the use of a card, such a card would not be required for any purpose except verification of work eligibility."¹¹¹

While the Simpson/Mazzoli sanctions are more stringent than those of the administration, their legalization proposal is more generous. Their bill would authorize immediate permanent resident alien status for (nonexcludable) aliens illegally residing in the United States before January 1, 1978.¹¹² The bill would also create a temporary resident status for aliens illegally present before January 1, 1980, with adjustment to permanent residence available after a period of two years if such aliens are not otherwise excludable and they can demonstrate minimal English language ability.¹¹³ As in the administration's bill, aliens granted this new temporary resident status would be free to work but could not sponsor the admission of their relatives, nor would they be eligible for most kinds of federal benefits.¹¹⁴

The Simpson/Mazzoli bill also recommends amending the H-2 temporary alien worker provision as an alternative to the administration's experimental temporary Mexican worker proposal, which the bill's sponsors feared could increase illegal immigration and might not be adequately responsive to the needs of southwestern agriculture for a substitute for undocumented seasonal workers.¹¹⁵ In recommending revisions in the numerically unlimited H-2 program, the two

108. SCIRP sought to raise the annual ceiling from 270,000 to 350,000, to expand the categories of relatives admissible without numerical restrictions, and to grant an extra 100,000 visas each year for five years to clear immigrant backlogs. See SCIRP FINAL REPORT, *supra* note 7, at 106-07.

109. 128 CONG. REC. H941 (daily ed. March 17, 1982).

110. *Id.* at H942.

111. *Id.*

112. *Id.* at H943.

113. *Id.*

114. *Id.*

115. 128 CONG. REC. 10,314 (1982); *New Temporary Worker Program with Mexico: Hearings Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary*, 97th Cong., 1st Sess 25 (1981).

immigration subcommittee chairmen incorporated the Select Commission's advice into their own recommendations to the executive and tried to strike a legislative balance between the conflicting interests of growers and those of organized labor and ethnic groups. Thus, while their bill would mandate special, streamlined certification procedures for the admission of alien farmworkers, it would also condition employer access to foreign workers on a Department of Labor finding of U.S. worker unavailability and no adverse impact, and would limit H-2 farmworker visas to eight months unless H-2 certifications in that occupation had previously been granted for longer periods of time.¹¹⁶

VI.

CONVERGENCE

Europe and America have very different immigration traditions. Despite those differences, their immigration policies may converge in the 1980's. During the last two decades, both regions faced similar internal and external economic pressures, which led the former to a *de jure* and the latter to a *de facto* reliance on foreign labor. Economic development on both sides of the Atlantic was uneven during that period, meaning that some employers found themselves "short" of labor but unwilling or unable to raise wages or restructure production processes. Although the bulk of these low-level jobs may have been quite different (assembly line manufacturing and construction in Europe, agriculture and services in the United States), the virtually limitless pool of very low-wage workers in nearby nations with burgeoning populations and high unemployment proved irresistible.¹¹⁷

Despite economic reasons for *de jure* or *de facto* acceptance of international labor flows, many indigenous social and political forces in Europe and the United States seek to prevent them. Environmental groups point to limited natural resources. Population groups do not want to provide a long-term safety valve which absolves developing nations of their population limitation responsibilities. Trade unions do not want additional workers to increase labor market competition. Equity-minded groups do not want national versions of the international socioeconomic inequalities that propel most labor flows. Those concerned about host-nation political or cultural unity worry about separatist forces. On the other hand, the direct actors, who want more immigration, the employers and the migrants themselves, are often supported by employer groups and by host-nation minority groups who believe ethnic migrants will mean more political power, e.g., Hispanics in the United States and the French-speaking minority in Belgium.

De jure or *de facto* guestworkers seem an ideal compromise in this sea of cross cutting currents. Migrants get jobs and employers get workers. Restrictionist sentiments are satisfied by promises that the guests will be recruited only for vacant jobs and will depart after one or two years.

116. *Id.* at H942.

117. East European nations also develop unevenly but they appear reluctant to encourage labor migration on a West European scale. East Germany began importing labor in 1967; in 1975, it employed 100,000 Poles and Hungarians, and Bulgarians. Czechoslovakia contains some 50,000 Poles and Hungarians, and Russia employs Bulgarians in forestry. See *ECONOMIST*, Jan. 18, 1975, at 40.

The guestworker compromise, so appealing in its simplicity, failed in Europe because its industrial democracies were not prepared to treat alien labor as a commodity or to break the bonds that tie migrants to their employers. The longer migrants remained, the more likely they were to have obtained rights to stay and to have their dependents join them. Since few nations proscribe family reunification, the immigration of workers resulted in still more immigration.

In sum, the possible convergence of European and American policies grows out of the analogous, and equally unanticipated, results of their otherwise distinct immigration policies and traditions. The vexing immigration question facing Europe today is whether economic integration of its foreign workers should be followed by the absorption of these workers and their families into the body politic. Meanwhile, in the United States, as Congress wrestles with the issue of regulating the entry of aliens into the U.S. labor market, it confronts both the question of political integration of its current population of undocumented workers and the question of a legal substitute for future flows.